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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 443

HARRY O. PAULY,

Petitioner,

vs.

WILSON McCARTHY AND HENRY SWAN, TRUSTEE OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

AN IMPORTANT QUESTION OF LAW IS INVOLVED

Respondents assert on page 2 of their brief that the Supreme Court of the United States, the majority and minority of the Supreme Court of Utah agree upon the controlling legal principles here involved. This statement is misleading and untrue. The majority of the Supreme Court of Utah set aside a verdict in favor of Petitioner, which rested upon an evidentiary basis and thus denied him his right of trial by jury. The majority determined the non-existence of respondent's duty of care by finding that petitioner was negligent, thus permitting contributory

negligence to become a complete defense in an action instituted under the F. E. L. A. This result was accomplished by holding: (1) that respondents were not negligent because petitioner was guilty of contributory negligence, and (2) by labeling petitioner's contributory negligence "sole proximate cause."

It is submitted that the decision of the majority of the Supreme Court of Utah is in direct conflict with the holdings of this Honorable Court in the cases cited by petitioner in his brief in support of Petition for Certiorari. The minority was in harmony with this Court and, therefore, dissented. Respondent's suggestion that there is agreement between the majority and the minority and this Court is ridiculous. The majority of the Utah Court has judicially repealed that portion of the F. E. L. A. which outlaws the defense of contributory negligence, it has denied recognition to the pronouncements of this Court that cases though close and doubtful which rest upon evidentiary bases must be submitted to the jury. Unless certiorari is granted here, the F. E. L. A. will not afford injured railroad employees suing in Utah the protection which Congress intended them to have. A review of this case and a pronouncement by this Court that contributory negligence cannot be given the effect which the majority has here given it and a pronouncement that petitioner's right of trial by jury may not be frittered away by a court after its function has been exhausted, will most certainly add something of substance, value and importance to the body of jurisprudence respecting the F. E. L. A.

RESPONDENTS' STATEMENT OF THE CASE IS MISLEADING

In their statement of the case respondents make many statements which are misleading and unsupported by the record. They make positive misstatements concerning the evidence and quote from a deposition of Petitioner taken long prior to trial as though it were the actual evidence in the case (See Respondents' Brief, pp. 11, 12 and 13). We will not take the time of this Court to point out every misstatement but will mention a few as examples.

Twice on page 4 of their brief, respondents state that petitioner backed off the caboose. This misstatement is repeated on pages 18, 21, 23 and 26. By this statement respondents are evidently attempting to convey the false impression that petitioner came out of the caboose with his face toward the car and his back toward the abyss. Petitioner was an expert trainman of seventeen years experience. He dismounted in the usual, ordinary manner, facing generally toward the West, the direction of the train movement, with the fusee in his left hand and his right hand on the hand rail situated on the west side or end of the caboose (See Pictures, Nos. 12 and 13, Exhibit "M", R. 220 and 221), and with his back toward the caboose. (R. 134, 135).

On page 4 of their brief, respondents state that if petitioner had looked he could have seen there was no footing. This statement is misleading both as matter of fact and principle.

We submit that the existence or non-existence of respondents' duty cannot be determined by a consideration

of petitioner's conduct. The mere fact that petitioner could have discovered the danger and unsafety of the bridge does not alter the fact that it was unsafe as the jury found it to be. The references cited by respondents do not support their statement. These references are to evidence of what others saw under wholly different circumstances. For instance, Linkins testified that he could see the caboose when he was in the creek-bed looking upward, but at that time there was a light in the creek and one in the caboose (R. 74). The Petitioner's testimony that the darkness of space looked like respondents' black slag roadbed at the time he ~~slipped~~ off the caboose is uncontradicted.

On page 4 of their brief, respondents state that petitioner had no work to do on the bridge. This is misleading. It was his duty to repair the sticking brake. To do this it was necessary to dismount from the caboose and walk along the roadbed to the car with the sticking brake. Respondents are evidently of the opinion that dismounting from the caboose and walking along the train was not work. This Court's holding in the recent case of *Anderson v. Mt. Clemens Pottery Co.*, 66 S. Ct. 1187 is, however, to the contrary.

By their presentation of the facts in this case, it is apparent that respondents are seeking to avoid the effect of the well-established rule of law that in determining whether or not a cause should be submitted to the jury, the evidence and inferences reasonably to be drawn therefrom must be viewed in the light most favorable to the plaintiff. *Termial R. Assn. of St. Louis v. Schorb*, 151 F. (2d) 361; *Christensen v. Utah Rapid Transit Co.*, 83 Utah 231, 27 P. (2d) 468.

PETITIONER'S DEPOSITION

On the cross examination of petitioner, respondents endeavored to impeach him with a deposition taken long prior to trial. Respondents now claim that some of the statements made by him at that time were contrary to his testimony at the trial, but that the testimony given in the deposition established the facts to be considered in this proceeding. Inconsistencies between the deposition and evidence given at the trial were matters going to the credibility of petitioner as a witness and were exclusively for the jury. It was for the jury to weigh the evidence and judge credibility. *Tennant v. Peoria & P. U. Railway Company*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

Petitioner throughout his cross examination (R. 122, 123, 124) and on redirect examination (R. 138, 139) testified that he had not carefully reviewed the facts and circumstances of his accident prior to the taking of his deposition and that the particulars were not clearly in his mind (all his time had been devoted to getting himself on his feet R. 139), but since that time and before trial he had gone over the case in his own mind and had reached the conclusion that some of the statements made in the deposition were not correct. Respondents contend that petitioner admitted on cross examination that the facts were as stated by him in the deposition. This is not so. Respondents reach this result by selecting certain parts of the cross examination and ignoring the balance of his testimony. This cannot be done. *Sullivan v. Beneficial Life Insurance Co.*, 91 Utah 405, 64 P. 2d. 351, wherein it was stated:

> "The Court is not justified in determining whether a directed verdict should be granted to determine the weight of plaintiff's evidence solely upon selected

parts of the evidence found in cross examination or elsewhere."

It is clear that where there is a conflict between testimony given at a deposition and on the trial, a question of credibility only is presented and that question is one for the jury. *Miller v. Schimming,* 129 Cal. App. 171, 18 P. 2d. 357; *Smarda v. Fruit Growers Supply Co.,* 1 Cal. App. (2d) 265, 36 P. 2d. 701; *Goodman v. Meyers,* 50 Cal. App. 2d. 356, 122 P. 2d 929.

Respondents insist that the statements made by petitioner in his deposition and at the trial were in conflict in two particulars. Throughout their brief they assert that petitioner admitted on cross examination that the statements made in regard to these matters in his deposition were true and that the statements made at the trial were therefore admittedly false. A reading of his entire testimony as given at the trial clearly refutes this contention. In answering questions on cross examination concerning the testimony given by him in his deposition, petitioner was clearly confused. Respondents' counsel admitted this (R. 125), yet he continued to ask the same question, namely, "Was it true?". These questions were confusing. The Petitioner did not know whether respondents' counsel mean't (1) was it true that petitioner had made the statement, or (2) were the statements made in the deposition true, or (3) did petitioner believe the statements true when made. We submit that any fair-minded person, from a consideration of all the testimony given by the petitioner at the trial, would conclude that what he was attempting to state was simply this: "I testified at the deposition in accordance with my best memory and recollection as of that time and I then thought that the testimony given was true, but since

then I have spent much time reflecting upon the occurrence and thinking about the events and the sequence in which they occurred and I have reached the conclusion that I was in error when I stated that I checked the passing train from the rear end of the caboose; as a matter of fact I checked the passing train from the front end of the caboose."

The tenacity and vigor with which respondents' urge their contention on this small matter reveals the fundamental weakness of their whole cause. Whether petitioner checked the passing train from the rear end or the front end of the caboose could not possibly affect the existence or non-existence of negligence on the part of respondents, certainly it could have no effect whatsoever upon the safety or lack of safety of the bridge. It is conceivable that petitioner's position upon the caboose when the passing train was checked might in some way affect the nature and character of his conduct as being negligent or otherwise, but the jury having found that petitioner was negligent and having reduced his damages accordingly, this matter has lost any importance which it may have had in this case. Respondents state that petitioner admitted he did not look as he stepped from the caboose. This statement is misleading, as appears from the following testimony found in the record at pages 133 and 134:

"Q. Did you testify as follows:

Q. Did you look down there before you stepped?

A. No, it was all black to me as if I was on the main line is all on the side of the track.

Did you so testify?

A. I so testified, but if it appeared all black to me as that statement says, I must have looked, didn't I?

Q. Was that answer true?

A. That I made that - - yes, yes."

They state that petitioner admitted that he was on the rear end of the caboose when the passenger train passed. This statement is misleading and the record is contrary to the assertion. Petitioner testified: (R. 126)

"Q. Which part of that answer do you now say was untrue?

A. Oh, I stepped to the rear platform to check the train.

Q. You say that wasn't true?

A. That's right."

THE PLATFORM BETWEEN TRACKS

Respondents, in their brief, avoid meeting petitioner's contention that all of the territory between switches at Chacra was a work place by arguing, as did the majority of the Utah Court, that petitioner could have alighted in safety on the north side of the tracks. They assert that inasmuch as there was a platform over the bridge between the tracks upon which petitioner could have alighted, the bridge was, therefore, safe as matter of law and fact. This argument lends nothing to the solution of the problem presented, except confusion. If the territory between switches at Chacra was a work place, then the dictates of duty required the whole structure to be maintained reasonably safe for its foreseeable use and foreseeable use is

not to be regarded as negligence. Respondents have never argued that dismounting from the south side of a train standing on the main line at Chacra on a dark night would be negligence unless such dismounting happened to be from a car standing on the bridge. It is respectfully submitted that respondents' position therefore must be either (1) that the territory between switches at Chacra is not a place of work as matter of law, or (2) that all of such territory is a work place and must be maintained in a reasonably safe condition for foreseeable use except the bridge, or (3) that all of such territory is a work place and must be maintained in a reasonably safe condition for forseeable use except the south side of the bridge.

It is apparent that respondents are not willing to rest their cause upon the first proposition in view of the evidence and the verdict of the jury. It is equally apparent that the second and third alternatives are untenable. The suggestion that petitioner could have dismounted from the north side in safety is of no relevance if the bridge be not a work place, it amounts to no more than a showing of contributory negligence if the bridge is a work place. Respondents' argument that petitioner could have dismounted in safety from the north side necessarily involves a tacit admission that the jury could well find from the evidence that the bridge was within and a part of a work area. Respondents' argument on this point is purely "hind-sight" argument. Petitioner did not wilfully and knowingly step off the bridge. As the jury found, there were many reasons attributable to the negligence of respondent for petitioner's injuries. If he had known that the caboose was on the bridge and that he was stepping off into space, this accident would never have occurred. Petitioner was possessed of the same

vital instinct of self-preservation that governs the acts of all of us, respondents' argument to the contrary notwithstanding.

LIGHTS AND MARKERS

In support of their contention that the bridge at Charca was safe as matter of law and fact, respondents assert that the record is void of evidence that the absence of lights or markers on the bridge constituted negligence. They argue that the absence of lights or markers can not be regarded as negligence because neither respondents nor other railroads use lights or markers on such bridges. The fallacy of this argument is clearly revealed in the words of Mr. Justice Holmes in *Texas & P. R. Co. v. Behymer*, 189 U. S. 468, 23 S. Ct. 622, 47 L. Ed. 905:

> "What is usually done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

This Court stated in *Northern Pacific R. Co. v. Mares*, 123 U. S. 710, 8 S. Ct. 321, 31 L. Ed. 296:

> "• • • ordinary care • • • is not merely such care as other railroad companies exercise under like circumstances, for other railroad companies may be careless."

OTHER BRIDGES

Respondents are in error in their assertion (Respondents' Brief, p. 21) that petitioner makes no contention that there is any evidence that respondents equipped other bridges situated similarly to the bridge at Charca with footwalks and hand rails. The record contains definite,

positive and uncontradicted evidence that all bridges over creeks, gullies and other similar depressions within the switch limits of passing tracks, yards, or stations in the division within which Chacra is located are equipped with footwalks and hand rails and, with one exception, painted white. (See Petitioner's testimony R. 140, 141, 142, 145, 146). The fact that petitioner did not specifically comment on this evidence in his petition or brief does not mean that he has in any way abandoned or overlooked this proof.

THE CASE OF KENNEY V. BOSTON & MAINE R. R., 92, N. H. 495, 33 Atl. 2d. 557

The above case is relied upon by respondents in support of their contention that the petition should be denied (Respondents' Brief, p. 19). The Kenney case is clearly distinguishable from the case at bar. In that case it appeared from the evidence that trainmen had occasion to alight from their trains at switches and at the station only. The locomotive in the Kenney case came to a stop on the bridge for no explainable reason and "no witness could assign any reason for stopping at that point and there is no evidence at all that the business in hand required it." In the case at bar the stop at Chacra was in keeping with usual and customary practice. The stop was made for a purpose necessary and incidental to the prompt and proper handling of the freight train. The tracks at Chacra, amongst other things, were continuously and customarily used for the purpose of making train inspection and incidental running repairs. There is no similarity as far as factual situations are concerned between the case at bar and the Kenny case.

THE CASE OF BOSTON & MAINE R. R. CO. V. MEECH, 156 F. 2d. 109

Had the bridge at Chacra been equipped with footwalk and guard rails and properly lighted it would have been safe for foreseeable use and the injuries to petitioner would never have occurred. These precautions could well have been taken by repondents for the purpose of affording greater safety to their employees.

The above case holds that where further reasonable precautions might have been taken, a question for the jury is made out even though the injured or deceased employee was inattentive to his own safety. The Court states:

> "It may be that the locomotive was being operated in the way usual and customary for the maneuver which resulted in the death of decedent, but nevertheless the fact remains it could have been operated more carefully. Another man could have been assigned to ride with the hosteler to keep a lookout from the fireman's side of the cab or from the rear of the tender for workmen in the vicinity of the engine house, who might be presumed to be busy and hence inattentive at times to their own safety, or the whistle on the locomotive could have been sounded as it drew into the wash stand to warn the man assigned there, as decedent had been, to 'strip' it.
>
> • • • • • •
>
> "The defendant might have painted lines on the platforms of its wash stand to indicate the extent to which locomotives overhang them and thus to warn persons on the platforms of the danger incident to standing near their inner borders, or it might even have set the platforms of its wash stand back from the tracks far enough to prevent locomotives from overhanging them at all.

"From the foregoing, it is clear that although some precautions were taken for the decedent's safety, further precautions were possible, and from this it follows, as we read the decisions cited above, that there was an 'evidentiary basis' for submitting the issue of the defendant's causal negligence to the jury, and hence that our 'function is exhausted.' Lavender v. Kurn, supra, 66 S. Ct. 744. Also we think it evident from what we have said that although the decedent could readily have taken more care than he did for his own safety either by standing back from the edge of the platform, or by watching more closely for locomotives coming in from the yard, or by standing on the northerly platform upon which his presence would normally be anticipated and where he would be in the hosteler's range of vision from the engineer's seat, still we cannot say as matter of law that his carelessness was the sole proximate cause of the accident."

Respectfully submitted,

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